

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,) NO. 61468-1-I
)
Respondent,)
)
v.) UNPUBLISHED OPINION
)
MARWAN A. HASAN,)
)
Appellant.) FILED: July 27, 2009

BECKER, J. — Marwan Hasan was convicted of eight counts of malicious mischief. He alleges that the trial court violated the speedy trial rule and improperly refused to treat three of the offenses as the same criminal conduct when calculating his offender score. The speedy trial rule was not violated because Hasan's trial counsel agreed to a continuance to ensure effective representation. The trial court properly counted the crimes at three city buildings separately because the crimes did not satisfy the test for same criminal conduct. We affirm.

FACTS

Everett Police Officer Steve Sieverson was working the night shift on August 26, 2007, when he received a report of an alarm sounding at a Super Supplements store at 4031 Colby Avenue. When Officer Sieverson arrived at the store, he found a window had been broken by some baseball-sized rocks. Officer Sieverson asked workers unloading a truck nearby if they had seen anyone. They said they saw a man wearing a yellow jacket walking north. Officer Sieverson slowly drove away north on Colby, shining his spotlight toward buildings and alleys. He noticed an insurance business at 3715 Colby with a broken window. A person across the street said he had seen a man wearing a light-colored coat and jeans throwing rocks through the window five minutes earlier. As Officer Sieverson quickly headed north on Colby to try to intercept the criminal, he received a report that someone was breaking glass at the Everett Transit Center. He went back and asked the witness at the insurance office to accompany him to the transit center to see if the person there was the same person he had seen earlier. Other officers had arrested Hasan at the transit center, and the witness said Hasan was the person he saw at the insurance office. Officers later discovered damage to five other buildings, including the Everett Housing Authority building and the Everett Municipal Court.

The State charged Hasan with five counts of first degree malicious mischief and three counts of second degree malicious mischief. The trial initially was set to begin on November 9, 2007. The record does not show when Hasan originally was arraigned, but it does indicate that, pursuant to CrR 3.3, the last allowable date for trial was November 16, 2007.

On November 9, the date set for trial, the parties agreed to continue the trial to December 7, 2007. On December 7, 2007, the parties agreed to continue the trial to December 14, 2007. Before the 14th, however, Hasan's counsel told the State that she intended to ask for another continuance to complete her investigation. Based upon defense counsel's representation, the State told its witnesses that they did not need to appear for trial. In court on December 14, however, Hasan disagreed with his counsel about the continuance because he did not want to exceed his speedy trial date.

Defense counsel explained the confusion and her dilemma:

When I let the State know that I needed a continuance for further investigation because of what the evidence showed, I was in trial and, unfortunately, unable to talk to Mr. Hasan directly. It was his wishes not to exceed his speedy trial date. I found that out Friday when I was at a CLE.

I want to respect the wishes of my client, but the investigation is still ongoing. I could be prepared to go within speedy trial, Your Honor, but it's in his best interest for us to finish the investigation, but I want to respect his wishes.

The court granted the State's request for a continuance:

I will find good cause for continuance based upon the State's representations. It further appears that defense counsel needs time for further investigation in the case. This also will be a Campbell continuance so that the defendant can obtain effective assistance of counsel at trial.

Hasan told the judge he did not agree to a continuance, but the judge explained he was granting it despite Hasan's disagreement because defense counsel needed more time to better represent Hasan. The trial was continued to February 15, 2008. On February 15, 2008, the parties agreed to continue the trial to February 29, 2008. Trial began on March 3, 2008.

A jury convicted Hasan as charged on all eight counts. Before he was sentenced, he asked the court to treat the crimes at the Everett Housing Authority, Everett Municipal Court, and Everett Transit Center as one offense because they were all city buildings and the crimes constituted the same criminal conduct. The court refused Hasan's request and treated the crimes as separate offenses.

Hasan argues that the trial court was required to dismiss the charges against him based upon a violation of CrR 3.3. CrR 3.3 requires a defendant who is detained in jail to be brought to trial within 60 days after being arraigned or within 30 days after the end of any period excluded from the computation of the time for trial. CrR 3.3(b)(1). Delays for continuances granted by the court pursuant to CrR 3.3(f) are excluded from

the computation of the time for trial. CrR 3.3(e). Continuances may be granted by written agreement of the parties, or by a motion of the court or a party when the “continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” CrR 3.3(f). A charge not brought to trial within the time required by CrR 3.3 must be dismissed with prejudice. CrR 3.3(h).

Although an accused has a constitutional right to a speedy trial,¹ the right to a trial within 60 days is not a constitutional right. State v. Smith, 104 Wn.2d 497, 508, 707 P.2d 1306 (1985); State v. Campbell, 103 Wn.2d 1, 15, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985). This court need not review a claim of error that was not raised in the trial court unless the court committed a manifest error affecting a constitutional right. RAP 2.5(a); State v. Ague-Masters, 138 Wn. App. 86, 110, 156 P.3d 265 (2007). Hasan objected to one of the continuances, but he did not ask the trial court to dismiss his case based upon a violation of CrR 3.3. Therefore, this court need not consider the speedy trial issue.

Even if we consider the issue, however, Hasan's argument fails. He argues that his right to a speedy trial could not be waived by his counsel without his consent because a defendant has a constitutional right to control his own defense. The

¹ U.S. Const. amend. 6; Wash. Const. Art. 1, § 22.

Supreme Court, however, rejected essentially the same argument in Campbell, stating that counsel “was properly granted the right to waive trial in 60 days, over defendant’s objection, to ensure effective representation and a fair trial.” Campbell, 103 Wn.2d at 15.

Hasan next argues that the trial court erred when it refused to count his crimes at the Everett Transit Center, Everett Municipal Court, and Everett Housing Authority as constituting the same criminal conduct for sentencing purposes.

Whenever a person is sentenced for two or more current offenses, the sentencing range for each current offense is determined by treating the other current offenses as if they were prior convictions when calculating the offender score, unless the court finds that the current offenses constitute the “same criminal conduct,” in which case they count as one crime:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.

RCW 9.94A.589(1)(a).

Multiple crimes encompass the “same criminal conduct” if they “require the same

criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). All three elements must be present for multiple offenses to encompass the same criminal conduct. State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992).

Because the statute is construed narrowly, most crimes are not considered to be the same criminal conduct. State v. Stockmyer, 136 Wn. App. 212, 218, 148 P.3d 1077 (2006). We defer to the trial court's determination regarding whether multiple crimes constitute the same criminal conduct unless the court clearly abused its discretion or misapplied the law. State v. Elliott, 114 Wn.2d 6, 17, 785 P.2d 440, cert. denied, 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 2d 80 (1990).

Hasan relies upon two cases as authority that the same place requirement should not be interpreted too literally. He cites State v. Longuskie, 59 Wn. App. 838, 801 P.2d 1004 (1990) and State v. Taylor, 90 Wn. App. 312, 321-22, 950 P.2d 526 (1998). But the issue in Longuskie and Taylor was not whether different locations constituted the same place. In Longuskie, the court decided that one count of child molestation and one count of kidnapping should be treated as the same criminal conduct when they involved the same victim at the same time and place. Longuskie, 59 Wn. App. at 847. In Taylor, the court decided that one count of assault and one count of kidnapping, which occurred with the same victim at the same time and place,

satisfied the “same criminal intent” element as well. Taylor and Longuskie do not support the proposition that separate counts of malicious mischief for throwing rocks at separate buildings must be treated as the same criminal conduct under RCW 9.94A.589(1)(a). Even if the City of Everett was the same victim in each count, the rock throwing did not occur at the same time and place. And the criminal intent was different because Hasan completed each crime before he commenced the next. Cf. State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). Therefore, even if Hasan had shown that the City of Everett was the victim of the malicious mischief at the transit center, courthouse, and housing authority buildings, the trial court did not abuse its discretion when it refused to treat the crimes at each as the same criminal conduct.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, A.C.J. Jan, J.